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§ 65.165(c)(1) and (2) to keep continuous records. If continuous records are required, the owner or operator shall specify in the monitoring plan whether the provisions of paragraphs (f)(1) and (2) of this section apply.

(4) If the owner or operator has chosen to use the alternative recordkeeping provisions of § 65.161(e)(1) and has not notified the Administrator in the Initial Compliance Status Report that the alternative recordkeeping provisions are being implemented as provided in § 65.165(e), the owner or operator shall notify the Administrator in the periodic report submitted immediately before implementation of the alternative.

### **§ 65.167 Other reports.**

(a) *Replacing an existing control or recovery device.* As specified in § 65.147(b)(2), § 65.148(b)(3), § 65.149(b)(3), § 65.150(b)(2), § 65.151(b)(2), § 65.152(b)(2), or § 65.153(b)(2), if an owner or operator at a facility not required to obtain a title V permit elects at a later date to use a different control or recovery device, then the Administrator shall be notified by the owner or operator before implementing the change. This notification may be included in the facility's periodic reporting and shall include a description of any changes made to the closed vent system.

(b) *Startup, shutdown, and malfunction periodic reports.* Startup, shutdown, and malfunction periodic reports shall be submitted as required in § 65.6(c).

### **§§ 65.168–65.169 [Reserved]**

## **PART 66—ASSESSMENT AND COLLECTION OF NONCOMPLIANCE PENALTIES BY EPA**

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APPENDIX A TO PART 66—TECHNICAL SUPPORT DOCUMENT [NOTE]

APPENDIX B TO PART 66—INSTRUCTION MANUAL [NOTE]

APPENDIX C TO PART 66—COMPUTER PROGRAM [NOTE]

AUTHORITY: Sec. 120, Clean Air Act, as amended, 42 U.S.C. 7420.

SOURCE: 45 FR 50110, July 28, 1980, unless otherwise noted.

### Subpart A—Purpose and Scope

#### § 66.1 Applicability and effective date.

(a) This part applies to all proceedings for the assessment by EPA of a noncompliance penalty as provided by section 120 of the Clean Air Act. This penalty is designed to recover the economic advantage which might otherwise accrue to a source by reason of its failure to comply with air pollution control standards after receipt of a notice of noncompliance.

(b) These regulations shall be effective October 27, 1980.

#### § 66.2 Program description.

This part sets forth the procedures by which EPA will administer the noncompliance penalty provisions of section 120 of the Clean Air Act. Subpart A describes the scope of the part, defines key terms and states the manner of operation of these provisions subpart B states which sources of air pollution are subject to these penalties and the form and substance of the notice of noncompliance. Subpart C and the accompanying Technical Support Document and Manual state how a source must compute the penalty which it owes. Subpart D describes the conditions under which an exemption from the penalty may be available, and subpart E sets forth the procedures for requesting such an exemption. Subpart F states how EPA will review penalties calculated by sources under subpart C, and subpart G describes the method of payment. Subpart H provides for adjustment of the penalty after the source has come into compliance and the actual costs of doing so are known. Finally, subpart I states which actions under these regulations are subject to judicial review and on what conditions, and subpart J provides supplemental procedures for adjudicatory hearings.

#### § 66.3 Definitions.

In this part and part 67:

(a) *Act* means the Clean Air Act, 42 U.S.C. 7401 *et seq.* as amended on August 7, 1977, except where the context specifically indicates otherwise.

(b) *Affiliated entity* means a person who directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the owner or operator of a source.

(c) *Applicable legal requirements* means any of the following:

(1) In the case of any major source, any emission limitation, emission standard, or compliance schedule under any EPA-approved State implementation plan (regardless of whether the source is subject to a Federal or State consent decree);

(2) In the case of any source, an emission limitation, emission standard, standard of performance, or other requirement (including, but not limited to, work practice standards) established under section 111 or 112 of the Act;

(3) In the case of a source that is subject to a federal or federally approved state judicial consent decree or EPA approved extension, order, or suspension, any interim emission control requirement or schedule of compliance under that consent decree, extension, order or suspension;

(4) In the case of a nonferrous smelter which has received a primary nonferrous smelter order issued or approved by EPA under Section 119 of the Act, any interim emission control requirement (including a requirement relating to the use of supplemental or intermittent controls) or schedule of compliance under that order.

(d) *Approved Section 120 program* means a State program to assess and collect Section 120 penalties that has been approved by the Administrator.

(e) *Computer program* means the computer program used to calculate noncompliance penalties under section 120 of the Clean Air Act. This computer program appears as appendix C to these regulations.

(f) *Control* (including the terms *controlling*, *controlled by*, and *under common control with*) means the power to direct

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or cause the direction of the management and policies of a person or organization, whether by the ownership of stock, voting rights, by contract, or otherwise.

(g) *Environmental Appeals Board* shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this part. Appeals directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(h) *Major stationary source* means any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant regulated by EPA under the Clean Air Act.

(i) *Manual* means the *Noncompliance Penalties Instruction Manual* which accompanies these regulations. This Manual appears as appendix B to these regulations.

(j) *Owner or operator* means any person who owns, leases, operates or supervises a facility, building, structure or installation which emits or has the potential to emit any air pollutant regulated by EPA under the Act.

(k) *Potential to emit* means the capability at maximum design capacity to emit a pollutant after the application of air pollution control equipment. Annual potential shall be based on the larger of the maximum annual rated capacity of the stationary source assuming continuous operation, or on a projection of actual annual emissions. Enforceable permit conditions on the type of materials combusted or processed may be used in determining the

annual potential. Fugitive emissions, to the extent quantifiable, will be considered in determining annual potential for those stationary sources whose fugitive emissions are regulated by the applicable state implementation plan.

(l) *Source* means any source of air pollution subject to applicable legal requirements as defined in paragraph (c).

(m) *Technical Support Document* means the *Noncompliance Penalties Technical Support Document* which accompanies these regulations. The Technical Support Document appears as appendix A to these regulations.

All other terms are defined as they are in the Act.

[45 FR 50110, July 28, 1980, as amended at 57 FR 5328, Feb. 13, 1992]

#### § 66.4 Limitation on review of regulations.

No applicable legal requirement, which could have been reviewed or challenged by means of the timely filing of an appropriate petition, no provision of this part or part 67 or appendices A, B or C, may be challenged, reviewed or re-examined in any hearing conducted under this part or part 67. This limitation on review includes, but is not limited to:

(a) Arguments that the statute is more or less restrictive than the regulations, e.g., that exemptions other than those provided herein should be granted.

(b) Arguments that the economic model does not accurately calculate the economic benefits of noncompliance, or that parameters, terms and conditions other than those provided for in the model should be used or that evidence other than that described in the Technical Support Document for establishing inputs should be considered.

#### § 66.5 Savings clause.

Proceedings under these regulations for imposition of a penalty under section 120 are in addition to any other proceedings related to permits, orders, payments, sanctions or other requirements of State or Federal law. No action under this part or part 67 shall affect in any way any administrative,

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civil or criminal enforcement proceeding brought under any provision of the Clean Air Act or State or local law.

### § 66.6 Effect of litigation; time limits.

(a) The existence of any litigation on the validity of these regulations shall not affect the authority of the Agency to issue notices of noncompliance or to conduct subsequent administrative proceedings under parts 66 and 67.

(b) Failure of the Environmental Appeals Board or the Presiding Officer at a hearing to meet any of the time limits contained in this part 66 and part 67 of this chapter shall not affect the validity of any proceeding under these regulations.

(c) The filing of any petition for reconsideration under this part or part 67 or the institution of EPA review of a State determination under part 67 shall not toll the accrual of noncompliance penalties. The penalty will be calculated from the date on which the source owner or operator receives a notice of noncompliance.

[45 FR 50110, July 28, 1980, as amended at 57 FR 5329, Feb. 13, 1992]

## Subpart B—Notice of Noncompliance

### § 66.11 Issuance of notices of noncompliance.

(a) The Administrator shall issue a notice of noncompliance to the owner or operator of any source which he determines is in violation of applicable legal requirements and which is located in a State without an approved section 120 program.

(b) The Administrator shall send a notice of noncompliance to the owner or operator of any source located in a State with an approved section 120 program when he determines as provided in part 67 that the source is in violation of applicable legal requirements and the State has failed to send a notice of noncompliance to it, or has failed to pursue diligently any subsequent steps for the assessment or collection of the penalty.

(c) Failure of EPA or a State to issue a notice of noncompliance within 30 days after discovery of a violation shall not affect the obligation of a source

owner or operator to pay a noncompliance penalty but shall affect the date from which the penalty is calculated. The penalty shall be calculated from the earliest date that the owner or operator of the source received a notice of noncompliance under this section, whether issued by EPA or the State.

### § 66.12 Content of notices of noncompliance.

(a) Each notice of noncompliance shall be in writing and shall include:

(1) A specific reference to each applicable legal requirement of which the source is in violation;

(2) A brief statement of the factual basis for the finding of violation, together with a reference to any supporting materials and a statement of when and where they may be inspected;

(3) Instructions on calculating the amount of the penalty owed and the schedule for payments. Such instructions shall include (i) a statement of the date from which penalties should be calculated and (ii) a copy of the Technical Support Document and the Manual;

(4) Notice of the right to petition for a hearing to challenge the finding of noncompliance or to claim an exemption; and

(5) Notice that the penalty continues to accrue during the pendency of any hearings granted under this part or part 67.

(b) Each notice of noncompliance shall be transmitted to the source owner or operator either by personal service or by registered or certified mail, return receipt requested.

### § 66.13 Duties of source owner or operator upon receipt of a notice of noncompliance.

(a) Within forty-five days after receiving a notice of noncompliance a source owner or operator shall either:

(1) Calculate the amount of the penalty owed and the appropriate quarterly payment schedule, as provided in the Technical Support Document and Instruction Manual, and transmit that calculation, together with supporting data sufficient to allow verification of the penalty calculation, to the Administrator; or

(2) Submit a petition for reconsideration, alleging that the source is not in violation of applicable legal requirements or that the source owner or operator is entitled to an exemption pursuant to §§ 66.31 through 66.33, or both. A source owner or operator must present both grounds in the petition if he wishes to preserve a claim to an exemption in the event that the source is found to be in violation. Issues relating to the existence of a violation or entitlement to an exemption not raised in the petition shall be deemed waived.

(b) Any submittal pursuant to this subsection shall specify the identity of the person responsible for the payment of any noncompliance penalty, and to whom any reimbursement, if necessary, shall be sent.

(c) A source owner or operator may amend any petition for reconsideration pursuant to paragraph (a) of this section within 45 days from receipt of a notice of noncompliance. Amendment of such petition after 45 days will be permitted only if based on unforeseeable conditions occurring after termination of the 45 day period, or upon consent of the Administrator.

### Subpart C—Calculation of Noncompliance Penalties

#### § 66.21 How to calculate the penalty.

(a) All noncompliance penalties shall be calculated in accordance with the Technical Support Document and the Manual.

(b) Where the Administrator determines that no existing technology or other emissions control method results in emission levels which satisfy the applicable legal requirement, the penalty calculation shall be based on the cost of the capital equipment, operation and maintenance practices, or other methods of control which best approximates the degree of control required. In such a case, the Administrator may include in the penalty the costs of participation in an EPA approved research and development program where he determines that such participation would be appropriate. Information on appropriate research and development programs will be available from the regional offices or from the Office of Research and Development.

#### § 66.22 Contracting out penalty calculation.

Upon the failure of a source owner or operator, who does not submit a petition for reconsideration as provided in § 66.13(a)(2), to submit the information described in § 66.13(a)(1) within 45 days of receipt of a notice of noncompliance, or upon submission of incorrect information as determined pursuant to § 66.51, the Administrator may enter into a contract with any qualified person who is not an affiliated entity and who has no financial interest in the owner or operator of the source to assist in determining the amount of the penalty assessment or payment schedule with respect to such source owner or operator. The cost of this contract may be added to the penalty to be assessed against the owner or operator of the source. The data used in calculating the penalty shall be furnished to the source owner or operator at the time that the penalty calculation is reported.

#### § 66.23 Interim recalculation of penalty.

(a) The Administrator, upon concluding that a previously approved penalty calculation no longer is accurate, may:

(1) Request, in writing, that the source owner or operator submit a revised calculation in the form specified in § 66.13(a). The Administrator shall respond to any information submitted in accordance with the provisions of § 66.51.

(2) Notify the source owner or operator, in writing, that the penalty has been recalculated based upon information in the Administrator's possession. The source owner or operator shall respond as provided in § 66.52.

(b) If a source owner or operator believes that, because of changed circumstances, a penalty calculation which has been accepted by EPA no longer is accurate, he may submit a revised penalty calculation and schedule to the Administrator. The revised calculation shall be in the form specified in § 66.13(a)(1). The Administrator shall respond in accordance with the provisions of § 66.51. The decision to accept the interim calculation or to grant a hearing on this issue shall be solely

within the discretion of the Administrator.

#### **Subpart D—Exemption Requests; Revocation of Exemptions**

##### **§ 66.31 Exemptions based on an order, extension or suspension.**

(a) A source owner or operator who would otherwise be subject to a non-compliance penalty will be exempted from that penalty during the period for which, and upon a demonstration that, its noncompliance with applicable legal requirements is or was due solely to;

(1) A conversion by such source from the burning of petroleum products or natural gas, or both, as the permanent primary energy source to the burning of coal pursuant to an order under section 113(d)(5) or section 119 of the Act as in effect before August 7, 1977.

(2) In the case of a coal-burning source, the issuance of a prohibition to that source against burning petroleum products or natural gas, or both, by means of an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974, the Powerplant and Industrial Fuel Use Act, or under any legislation which amends or supersedes these provisions, *Provided*, That the source had received an extension under the second sentence of section 119(c)(1) of the Act as in effect before August 7, 1977.

(3) The use of innovative technology by the source owner or operator pursuant to an enforcement order under section 113(d)(4) of the Act.

(4) An inability to comply with an applicable legal requirement resulting from reasons entirely beyond the control of the owner or operator of such source or of any affiliated entity, *Provided*, That

(i) The source owner or operator has received an order under section 113(d) (or an order under section 113 issued before August 7, 1977) or a federal or EPA-approved State judicial decree or order which has the effect of permitting a delay in complying with the legal requirement at issue, and

(ii) That the source owner or operator meets the requirements of paragraphs (c) and (d) of this section.

(5) The existence of an energy or employment emergency demonstrated by issuance of an order under section 110(f) or 110(g) of the Act, unless such order is disapproved by EPA.

(b) To qualify for an exemption under this section, the source owner or operator must have received the order, extension or suspension or consent decree described in the paragraph of the section pursuant to which the exemption is claimed. No exemption may be sought which, if granted, would exceed the terms of the relevant extension, order, suspension, or consent decree, except as provided in paragraph (e) of this section. No exemption may be sought which is based on a claim that the source owner or operator is entitled to any such order, extension, suspension, or consent decree even though it has not been issued.

(c) In any exemption claim based on paragraph (a)(4) of this section, the source owner or operator must demonstrate:

(1) That the source owner or operator or an affiliated entity in no manner sought, caused, encouraged or contributed to the inability; and

(2) That the source owner or operator in no way unduly delayed negotiation for needed equipment or fuel supply or made unusual demands not typical in its industry, or placed unusual restrictions on the supplier, or delayed in any other manner the delivery of goods or the completion of the necessary construction.

(d)(1) No exemption will be granted pursuant to paragraph (a)(4) of this section unless the owner or operator of the source demonstrates that, with respect to a situation described in paragraph (c), all reasonable steps were taken to prevent the situation causing the inability to comply, that procuring the needed pollution control equipment or fuel supply was given and continues to be given the highest possible priority in the planning and budgeting process of the owner or operator of the source, and that alternative sources of equipment and fuel have been explored without success.

(2) Any exemption granted under paragraph (a)(4) of this section shall cease to be effective when the inability to comply ceases to be entirely beyond

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the control of the source owner or operator as defined in this section.

(e) Except in the case of exemptions based on orders under section 113 (d)(4) or (d)(5) or suspensions under section 110(g), the Administrator may grant an exemption with retroactive effect to the date of the event giving rise to the section 120 predicate order, extension, suspension, or consent decree. In such cases, the exemption from the non-compliance penalty shall run from the date that the basis for the exemption first occurred.

[45 FR 50110, July 20, 1980, as amended at 50 FR 36734, Sept. 9, 1985]

## § 66.32 De Minimis exemptions.

(a) The Administrator may, upon notice and opportunity for public hearing, exempt the owner or operator of any source from a penalty where he finds that a particular instance of non-compliance was *de minimis* in nature and duration.

(b) A petition for an exemption on the ground that the violation described in a notice of noncompliance was *de minimis* in nature and duration may only raise issues related to entitlement to an exemption and shall contain or be accompanied by supporting documentation. Issues relating to entitlement to a *de minimis* exemption not raised in the petition shall be deemed waived.

(c) In ruling upon such a petition, the Administrator shall consider:

(1) The magnitude of the excess emissions and whether the source's non-compliance is recurring or persistent;

(2) The steps the source owner or operator is taking to eliminate the cause of the excess emissions and to minimize such emissions;

(3) Whether any significant economic savings are likely to accrue to the owner or operator of the source as a result of the noncompliance;

(4) The character of the emissions, and their impact on ambient air quality; and

(5) The duration of the violation.

(d) A hearing on a petition for a *de minimis* exemption shall be informal. The hearing shall be scheduled upon notice to the public. Reasonable opportunity to testify and for submission of questions by the public to the peti-

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tioner shall be afforded. The decision of the hearing officer will be made in writing within a reasonable period of time after the close of the hearing.

## § 66.33 De Minimis exemptions: malfunctions.

(a) The Administrator may, upon notice and opportunity for a public hearing, exempt the owner or operator of a source if he finds with respect to a particular instance of noncompliance, that such noncompliance was *de minimis* in nature and duration, and was caused solely by a sudden and unavoidable breakdown of process or pollution control equipment.

(b) A petition for an exemption on the ground that the violation was *de minimis* and was caused by a sudden and unavoidable breakdown of process or pollution control equipment may only raise issues related to entitlement to an exemption and shall contain or be accompanied by supporting documentation. Issues relating to entitlement to an exemption that are not raised in the petition shall be deemed waived. In making such finding the Administrator shall consider whether:

(1) The violation was *de minimis* in nature and duration within the meaning of § 66.32;

(2) The air pollution control equipment, process equipment, or processes, including appropriate back-up systems, were designed, and have been maintained and operated in a manner consistent with good practice for minimizing emissions;

(3) Repair of the malfunctioning equipment was undertaken and carried out in an expeditious fashion as soon as the owner or operator knew or should have known that the malfunction existed or that applicable emission limitations were being violated or were likely to be violated;

(4) All practicable steps were taken to minimize the impact of the excess emissions (including any bypass) on ambient air quality;

(5) The excess emissions were not part of a pattern indicative of inadequate design, operation, or maintenance;

(6) Off-shift and overtime labor were utilized where necessary to ensure that repairs were made as expeditiously as

possible or that emissions were minimized to the maximum extent possible; and

(7) The level of economic savings, if any, accruing to the source owner or operator was *de minimis*.

(c) Any activity that could have been foreseen, avoided or planned for, or any breakdown that could have been avoided by the exercise of reasonable diligence shall not constitute grounds for an exemption under this section. Such activities include, but are not limited to, sudden breakdowns avoidable by better maintenance procedures, phasing in and out of process equipment and routine maintenance.

(d) A hearing on any petition for an exemption based upon the unavoidable breakdown of pollution control equipment shall be informal. The hearing shall be scheduled upon notice to the public. Reasonable opportunity to testify and for submission of questions by the public to the petitioner shall be afforded. The decision of the hearing officer will be made in writing within a reasonable period of time after the close of the hearing.

#### § 66.34 Termination of exemptions.

(a) Exemptions pursuant to § 66.31(a) (1), (2), (3), and (5) will cease to be effective upon termination or revocation of the order on which the exemption is based.

(b) Exemptions pursuant to § 66.31(a)(4) will cease to be effective when the order or decree is terminated or revoked, or the inability to comply ceases to be for reasons entirely beyond the control of the source owner or operator as defined in § 66.31(c).

(c) Exemptions granted pursuant to § 66.32 or § 66.33 shall terminate at the time specified in the exemption.

(d) The Administrator shall notify the source owner or operator, in writing, that the exemption has terminated, and shall specify the date from which the penalty shall be calculated. The notice shall be transmitted as required by § 66.12. The source owner or operator shall respond to this notice within 45 days of its receipt and in the form provided in § 66.13.

#### § 66.35 Revocation of exemptions.

(a) The Administrator may upon notice and opportunity for a hearing revoke an exemption granted to the owner or operator of any source at any time in accordance with paragraphs (b) and (c) below.

(b) An exemption may be revoked and a penalty for the period of non-exempted noncompliance assessed if:

(1) The grounds for the exemption no longer exist or never did exist, or

(2) In the case of an exemption under § 66.31, the source owner or operator has failed to comply with any interim emission control requirements or schedules of compliance (including increments of progress) contained in the extension, order, suspension or EPA-approved consent decree on which the exemption was based.

(c) The Administrator shall provide the source owner or operator written notice containing the information required by § 66.12 and a statement of the reasons for revocation. The notice shall also specify the date from which the source owner or operator must calculate a penalty. The notice shall be transmitted as required by § 66.12. The source owner or operator shall respond to this notice within 45 days of its receipt and in the form provided in § 66.13.

### Subpart E—Decisions on Exemption Requests and Challenges to Notices of Noncompliance

#### § 66.41 Decision on petitions.

(a) Within thirty days after receiving a petition filed under § 66.13, the Administrator shall notify the source owner or operator in writing that:

(1) The petition demonstrates that the source owner or operator is entitled to part or all of the relief requested and that the notice of noncompliance is withdrawn or modified accordingly;

(2) The petition does not contain sufficient information to demonstrate that the source owner or operator is entitled to part or all of the relief requested. The Administrator shall specify what deficiencies exist and request

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that the source owner or operator supplement his petition within thirty days of receipt of that request. If the petition is not supplemented adequately within this time, or, if supplemented adequately, still fails to demonstrate entitlement to relief, the Administrator shall grant a hearing under paragraph (a)(3) of this section. Any supplemental material provided pursuant to the Administrator's request shall be evaluated as provided in paragraphs (a)(1) and (a)(3) of this section.

(3) A hearing is granted on the issue of whether the source is in violation of applicable legal requirements or is entitled to an exemption under § 66.31, § 66.32, § 66.33, or on both.

[45 FR 50110, July 20, 1980, as amended at 50 FR 36734, Sept. 9, 1985]

### **§ 66.42 Procedure for hearings.**

(a) Except as provided in §§ 66.32 and 66.33, hearings granted under § 66.41(a)(3) shall be held as provided in subpart J.

(b) If hearings are granted pursuant to both § 66.32 or § 66.33 and under subpart J, a consolidated hearing in accordance with subpart J shall be held. At the consolidated hearing the issues that would otherwise have been considered at a hearing under § 66.32 or § 66.33 shall be considered pursuant to the procedures for a hearing provided in those sections.

(c) The Presiding Officer at a hearing granted under § 66.41 shall issue an initial decision within 90 days after the Administrator grants the hearing, unless the duration of the hearing or the deadline for decision is extended by the Presiding Officer upon agreement of the parties. Failure to issue a decision (whether or not by consent) within 90 days shall not affect the validity of the proceedings or the accrual of penalties in any manner.

### **§ 66.43 Final decision; submission of penalty calculation.**

Within forty-five days after EPA has notified the owner or operator of a source of the final Agency decision that it is in violation of applicable legal requirements or is not entitled to an exemption, the owner or operator shall submit the information required by § 66.13(a), including appropriate com-

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pliance and payment schedules and extra interest owed for the period of delay. The penalty shall be calculated from the date of receipt of the original notice of noncompliance.

### **Subpart F—Review of Penalty Calculation**

#### **§ 66.51 Action upon receipt of penalty calculation.**

(a) Within thirty days after receipt of a penalty calculation provided pursuant to § 66.13(a)(1) or § 66.43, the Administrator shall notify the source owner or operator in writing, that:

(1) The penalty is provisionally accepted as calculated, subject to any recalculation that may be necessary under § 66.72 after the source has achieved compliance; or

(2) The penalty is incorrect and has been recalculated based on the data provided by the source owner or operator, or other data. The Administrator shall provide a brief statement of the basis for the recalculation and shall identify when and where any supporting data may be examined. The Administrator shall also notify the source owner or operator of the right to petition for a hearing under § 66.52; or

(3) The source owner or operator has not submitted any calculation, or the information submitted is inadequate to enable EPA to verify the owner or operator's penalty calculation. The Administrator shall specify what deficiencies exist and request the source owner or operator to supplement his submission within thirty days of receipt of that request. If an inadequate supplemental submission is made within this time, EPA may calculate the penalty itself or as provided in § 66.22.

(b) Supplemental material provided pursuant to paragraph (a)(3) of this section shall be evaluated as provided in paragraph (a).

#### **§ 66.52 Petitions for reconsideration of calculation.**

Within forty-five days after receipt of notice under § 66.51(a)(2) that the penalty has been recalculated by EPA, a source owner or operator who wishes to challenge EPA's recalculation shall petition in writing for reconsideration. A statement of all arguments on which

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the owner or operator relies, including all necessary supporting data and a substitute penalty calculation and payment schedule shall be included in or accompany this petition. Issues not raised in the petition shall be deemed waived.

### § 66.53 Decisions on petitions.

Within thirty days after receiving a petition for reconsideration under § 66.52 the Administrator shall:

(a) Accept the penalty calculation of the owner or operator to the extent the Administrator concludes it is correct; or

(b) Grant a hearing to the extent he does not conclude that the petition is correct.

[45 FR 50110, July 20, 1980, as amended at 50 FR 36734, Sept. 9, 1985]

### § 66.54 Procedures for hearing.

(a) Hearings granted under § 66.53 shall be held as provided in subpart J.

(b) The Presiding Officer at a hearing granted under § 66.53 shall issue an initial decision within ninety days after the Administrator grants the hearing, unless the duration of the hearing or the deadline for decision is extended by the Presiding Officer upon agreement of the parties. Failure to issue a decision (whether or not by consent) within 90 days shall not affect the validity of the proceedings or the accrual of penalties in any manner.

## Subpart G—Payment

### § 66.61 Duty to pay.

(a) Except where the owner or operator has submitted a petition pursuant to § 66.13(a)(2), the first installment of the penalty shall be paid on the date six months after receipt of the notice of noncompliance.

(b) Where the source owner has filed a petition pursuant to § 66.13(a)(2), the first installment consisting of payment of penalties for all quarters "missed" as well as for the upcoming quarter shall be paid on the date six months after a final administrative decision affirming the source owner or operator's liability. Installments shall be paid quarterly thereafter until compliance is achieved. Quarters shall be measured

in increments of three calendar months from the date the first payment is due.

(c) A source owner or operator who submits a petition pursuant to § 66.52 shall pay the penalty amount calculated by the owner or operator under § 66.13 or § 66.43 or any penalty calculated by EPA where the owner or operator has failed to calculate such penalty. Within 45 days after EPA has notified the owner or operator of a final administrative action after hearings on such petition, the owner or operator shall submit any necessary modification to the penalty. The revised penalty will be calculated in accordance with the Technical Support Document and the Manual, and a revised schedule, including appropriate adjustments for overpayments or underpayments made, will be established.

### § 66.62 Method of payment.

Payments in excess of \$10,000 under this part shall be made by wire transfer payable to the U.S. Treasury. Payments under this part which are less than \$10,000 shall be made by cashier's or certified check made payable to the United States Treasury, sent by registered mail, return receipt requested, and addressed to the Administrator, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Payment by check is made on the due date if it is postmarked on or before the due date. Payment by wire transfer is made on the due date if the Treasury's account is credited on or before the due date.

### § 66.63 Nonpayment penalty.

(a) Any source owner or operator who fails to make timely payment under § 66.61 shall pay in addition to the penalty owed a quarterly nonpayment penalty. The nonpayment penalty shall be calculated as of the due date of the noncompliance penalty payment and shall be equal to 20 percent of the aggregate amount of the noncompliance penalties and nonpayment penalties due and owing from the owner or operator on the due date. Partial payments shall be credited first against the nonpayment penalty, then against the noncompliance penalty.

(b) The Administrator shall notify the source owner or operator in writing

of the amount of any nonpayment penalty for which the owner or operator is liable. Failure of the Administrator to provide such notice immediately shall not affect the legal obligation of the source owner or operator to pay such penalty. Such nonpayment penalty, as well as the past due noncompliance penalty, shall be payable immediately.

## Subpart H—Compliance and Final Adjustment

### § 66.71 Determination of compliance.

(a) An owner or operator of a source who is paying a noncompliance penalty under this part shall notify the Administrator in writing when he believes that the source has come into and is maintaining compliance with all applicable legal requirements. The notice shall be accompanied by any factual data, analytical materials, and legal arguments which the source owner or operator believes support such claim.

(b) Within 30 days of receipt of a source owner's submittal, the Administrator shall determine whether the source has achieved and is maintaining compliance with applicable legal requirements, and shall notify the source owner or operator of this determination in writing. If the Administrator is unable to conclude, on the basis of the information submitted, whether the source has achieved and is maintaining compliance with applicable legal requirements, he shall inform the owner or operator of any additional material that is needed. Within 30 days of receipt of such additional material, the Administrator shall determine whether the source has achieved and is maintaining compliance, and shall notify the source owner or operator of this determination in writing.

(c) If the Administrator determines that the source has not achieved or is not maintaining compliance with applicable legal requirements, the source owner or operator may petition for reconsideration within 30 days of receipt of the determination. The source owner or operator shall include in this petition any necessary supporting material. Issues not raised in the petition will be deemed waived. The procedures of § 66.41 shall be followed upon the receipt of such petition.

(d) In the event that the applicable legal requirement (as defined in § 66.3(c)) the violation of which forms the basis for the penalty is superseded by another applicable legal requirement (as defined in § 66.3(c)) the owner or operator of a source liable for a noncompliance penalty under this part shall notify the Administrator in writing that the owner or operator believes that the applicable legal requirement is superseded and that the period of noncompliance covered by the notice of noncompliance is ended. The notice shall be accompanied by the legal arguments which the source owner or operator believes support such a claim. Within 30 days of receipt of a source owner or operator's notice, the Administrator shall determine whether the period of covered noncompliance is ended and shall notify the source owner or operator of this determination in writing. In cases where the superseding EPA-approved requirement was not approved by EPA within the time period required by statute, the period of covered noncompliance shall be deemed to have ended on the date when EPA under the statute should have acted.

[45 FR 50110, July 20, 1980, as amended at 50 FR 36734, Sept. 9, 1985]

### § 66.72 Additional payment or reimbursement.

(a) Within 120 days after the source owner or operator receives notification pursuant to § 66.71(b) that it has achieved and is maintaining compliance with applicable legal requirements, or within 120 days after receipt of a decision to that effect upon petition and hearing, or within 120 days after receipt of a decision to that effect upon an appeal to the Environmental Appeals Board, the source owner or operator shall submit to the Administrator a revised penalty calculation as provided in the Technical Support Document and the Manual, together with data necessary for verification. The revised calculation shall include interest on any underpayment.

(b) Within thirty days after receiving a revised penalty calculation provided pursuant to paragraph (a) of this section, the Administrator shall inform

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the source owner or operator in writing that:

(1) The revised penalty is correct as calculated;

(2) The revised penalty is incorrect and has been recalculated based on the data provided by the source owner or operator or on other data. The Administrator shall provide to the source owner or operator a brief statement of the basis of the recalculation and shall identify when and where any supporting data may be examined. The Administrator shall also notify the source owner or operator of the right to petition for reconsideration under § 66.73; or

(3) The source owner or operator has not submitted any penalty calculation, or has not submitted enough material to enable EPA to verify the penalty calculation. The Administrator shall specify what deficiencies exist and shall require the source owner or operator to furnish the supplemental material within thirty days of receipt of the notice. The supplemental material submitted will be evaluated in the same manner as the original submittal.

(c) If a source owner or operator fails to submit or to complete a revised penalty calculation when due under this section or the calculation submitted is incorrect, the Administrator may recalculate the penalty or may enter into a contract for independent calculation of the penalty as provided in § 66.22.

(d) Within 120 days after the source owner or operator receives notification pursuant to § 66.71(d) that the period of covered noncompliance ended on the date the applicable legal requirement was superseded (or, in event of EPA delay past an applicable statutory deadline, on the date the applicable legal requirement would have been superseded if there had been no delay past the statutory deadline), the source owner or operator shall submit to the Administrator a revised penalty calculation as provided in the Technical Support Document and Manual together with data necessary for verification. The revised calculation shall include interest on any underpayment. Paragraphs (b) and (c) shall

apply to calculations submitted under this paragraph.

[45 FR 50110, July 20, 1980 as amended at 50 FR 36734, Sept. 9, 1985; 57 FR 5329, Feb. 13, 1992]

### **§ 66.73 Petition for reconsideration and procedure for hearing.**

Within forty-five days of receipt of a notice under § 66.72(b) (2) a source owner or operator may petition for reconsideration in the form and manner provided in § 66.52. The petition shall be evaluated as provided in § 66.53 and any hearing shall be held in conformity with § 66.54.

### **§ 66.74 Payment or reimbursement.**

(a) Within thirty days after any adjustment of a noncompliance penalty under this subpart has become administratively final:

(1) Any deficiency owed by the source owner or operator shall be paid as provided in § 66.62.

(2) Any reimbursement shall be paid by check from the United States payable to the order of the source owner or operator, and sent by registered or certified mail, return receipt requested.

(b) Any payment under paragraph (a) of this section, shall include interest on the amount of the deficiency or reimbursement due, from the date the deficiency or reimbursement arose, at a rate determined by the Secretary of the Treasury. Such payment shall be calculated in accordance with the Technical Support Document and the Manual.

(c) Any source owner or operator who fails to make timely payment of a deficiency shall pay a nonpayment penalty. The nonpayment penalty shall be calculated as of the due date of the deficiency payment and shall be equal to 20% of the deficiency not paid. Such nonpayment penalty (in addition to the amount of the deficiency owed) shall be payable immediately. If any part of the nonpayment penalty or deficiency shall remain unpaid at the end of three calendar months from the due date of the deficiency, a further nonpayment penalty shall be due equal to 20% of the sum of all payments due and owing. Partial payments shall be credited first against the nonpayment penalty, then the deficiency.

## Subpart I—Final Action

### § 66.81 Final action.

(a) A final Agency action appealable to the courts by the source owner or operator includes and is limited to the following, provided the conditions of paragraph (b) of this section are met:

(1) A notice of determination that a source is in violation of applicable legal requirements;

(2) A notice of decision to deny or revoke an exemption under subpart D;

(3) A notice of revision by EPA of a penalty calculation or schedule under subpart F;

(4) A notice of decision by EPA that the source is not in final compliance or any revision by EPA of a final penalty calculation under subpart H; and

(5) A notice of denial of a petition for reconsideration under § 66.71 or § 66.73.

(6) A decision by the Administrator upon completion of any review of a State action pursuant to part 67.

(b) The actions listed in paragraph (a) of this section constitute final Agency action only if all administrative remedies have been exhausted. To exhaust administrative remedies, a source owner or operator must first petition for reconsideration of the decision in question and, if unsuccessful after hearing or after denial of hearing, appeal the decision in question to the Environmental Appeals Board. The action becomes final upon the completion of review by the Environmental Appeals Board and notice thereof to the owner or operator of the source.

(c) Where a petition seeks reconsideration both of the finding of noncompliance and of the finding of liability on the ground that the source owner or operator is entitled to an exemption, both questions must be decided before any review by the Environmental Appeals Board is sought, except on agreement of the parties.

[45 FR 50110, July 20, 1980, as amended at 50 FR 36734, Sept. 9, 1985; 57 FR 5329, Feb. 13, 1992]

## Subpart J—Supplemental Rules for Formal Adjudicatory Hearings

### § 66.91 Applicability of supplemental rules.

The Supplemental Rules in this subpart, in conjunction with the Consolidated Rules of Practice (40 CFR part 22) shall govern all hearings held under this part. To the extent that the provisions of these Supplemental Rules or any other provision of this part are inconsistent with the Consolidated Rules, the provisions of this part shall govern.

### § 66.92 Commencement of hearings.

(a) The provisions of 40 CFR 22.08 (Consolidated Rules of Practice) shall become applicable when the Administrator grants a hearing.

(b) Upon granting a hearing the Administrator shall immediately transmit to the appropriate Regional Hearing Clerk two copies of the notice granting the hearing and:

(1) In the case of a hearing pursuant to § 66.42, two copies of the notice of noncompliance under § 66.11 (or the revocation notice under § 66.34) and of the petition of the owner or operator under § 66.13, together with supporting documents; and

(2) In the case of a hearing pursuant to § 66.53 or § 66.73, two copies of the penalty calculation of the source owner or operator provided pursuant to § 66.13(a) or § 66.72, and of any Agency recalculation pursuant to § 66.51(a)(2) or § 66.72(b)(2), and of the petition of the source owner or operator for reconsideration pursuant to § 66.52 or § 66.73, together with supporting documents.

(3) The Regional Hearing Clerk shall open and maintain the official file of the proceeding upon receipt of the documents referred to in paragraphs (b)(1) and (2) of this section.

(c) Upon granting a hearing the Administrator shall request the Chief Administrative Law Judge to designate an Administrative Law Judge to serve as the Presiding Officer. The Chief Administrative Law Judge shall make this designation within seven days of receiving the request, and shall notify the Regional Hearing Clerk of his action. The Regional Hearing Clerk shall forward to the Presiding Officer one set

of the documents described in paragraph (b).

#### **§ 66.93 Time limits.**

The Presiding Officer upon designation shall notify the parties and shall, if appropriate, schedule a prehearing conference (or alternative procedures) under 40 CFR 22.19 and shall notify the parties of the date of hearing under 40 CFR 22.21. The Presiding Officer shall issue an initial decision no later than ninety days after the hearing is granted, unless an extension of the hearing schedule or of the deadline for decision is agreed to by the parties. To that end, the Presiding Officer may establish such deadlines as are reasonable and necessary. Failure to issue a decision within 90 days or further extended deadline (whether or not by consent) shall not affect the validity of the proceedings.

#### **§ 66.94 Presentation of evidence.**

(a) In hearings pursuant to § 66.42 EPA shall present evidence of violation of applicable legal requirements. The source owner or operator shall then present any rebuttal evidence.

(b) In hearings under § 66.42 the source owner or operator shall present evidence of entitlement to an exemption. EPA shall then present any rebuttal evidence.

(c) In hearings under §§ 66.54 and 66.73 EPA shall present evidence that its calculation or revisions of the source owner or operator's penalty calculations are correct. The source owner or operator shall then present any rebuttal evidence.

(d) Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

(e) Any documentation submitted pursuant to § 66.92(b) shall automatically be received into evidence in the hearing.

#### **§ 66.95 Decisions of the Presiding Officer; Appeal to the Administrator.**

(a) The Presiding Officer shall dispose of the issues raised in the hearing in a single written decision. Such decision shall terminate the Presiding Officer's consideration of those issues.

(b) Penalty calculations and payment schedules, if any, established by the de-

cision of the Presiding Officer shall be based solely on the parameters, terms and conditions of the Technical Support Document, Manual, and Computer Program.

(c) An appeal to the Environmental Appeals Board from a decision of the Presiding Officer shall be made by petition filed within twenty (20) days from receipt by a party of the Presiding Officer's decision. The Environmental Appeals Board shall rule on the appeal within 30 days of receipt of a petition. No appeal may be made before receipt of the decision of the Presiding Officer.

[45 FR 50110, July 20, 1980, as amended at 57 FR 5329, Feb. 13, 1992]

#### **APPENDIX A TO PART 66—TECHNICAL SUPPORT DOCUMENT**

NOTE: For text of appendix A see appendix A to part 67.

#### **APPENDIX B TO PART 66—INSTRUCTION MANUAL**

NOTE: For text of appendix B see appendix B to part 67.

#### **APPENDIX C TO PART 66—COMPUTER PROGRAM**

NOTE: For text of appendix C see appendix C to part 67.

### **PART 67—EPA APPROVAL OF STATE NONCOMPLIANCE PENALTY PROGRAM**

#### **Subpart A—Purpose and Scope**

Sec.

67.1 Purpose and scope.

#### **Subpart B—Approval of State Programs**

67.11 Standards for approval of State programs.

67.12 Application for approval of programs.

67.13 Approval.

67.14 Amendments to the program.

67.15 Revocation.

#### **Subpart C—Federal Notice of Noncompliance to Sources in States With Approved Programs**

67.21 Federal notice of noncompliance to owners or operators of sources in States with approved programs.